13

Office-Supreme Court, U.S.
FILED
OCT 10 1951
CHARLES ELMORE CROPLEY

# In the Supreme Court of the United States

**October Term, 1951.**

**No. 307.**

THE CLARK ESTATE COMPANY, a Corporation, *Petitioner,*

vs.

ALONZO H. GENTRY, COMMERCE TRUST COMPANY, a Corporation, ESTHER REYBURN and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, Co-Executrix and Co-Executor of the Estate of Roscoe Reyburn, Deceased, *Respondents.*

## JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

ARMWELL L. COOPER,
1015 Commerce Building,
*Counsel for All Respondents,*
WALLACE SUTHERLAND,
1015 Commerce Building,
*Counsel for Respondent Gentry,*
ROBERT L. JACKSON,
304 Commerce Building,
*Counsel for Respondents The First National Bank and Esther Reyburn, Co-Executors,*
HUGH M. HILLER,
PHILIP J. CLOSE,
218 Commerce Building,
*Counsel for Respondent Commerce Trust Company,*
All of Kansas City, Missouri.

SMITH-GRIEVES LAW PRINTERS, KANSAS CITY, MO.

## INDEX.

PAGE

Statement ..... 1

Brief and argument ..... 5

I. No basis of jurisdiction ..... 5

II. The decision upon which review is sought does not conflict with any prior decision ..... 9

Conclusion ..... 18

### Cases Cited.

Allen v. Arguimbau, 198 U. S. 149, 154, 155, 49 Law Ed. 990, 993, 25 Supreme Court 622 ..... 8

American Surety Company v. Baldwin, 287 U. S. 156, 77 Law Ed. 231, 53 Supreme Court 98 ..... 8

Cleveland v. Gore Bros, 14 Cal. App. 2d 681, 58 P. 2d 931 ..... 5

Goldschmidt v. Pevely Dairy Co., 341 Mo. 982, 111 S. W. 2d 1, l. c. 3 ..... 17

Klinger v. Missouri, 13 Wall. (U. S.) 257, 263, 20 Law Ed. 635, 637 ..... 8

Lynch v. New York, 293 U. S. 52, 79 Law Ed. 191, 55 Supreme Court 16 ..... 9

Rooker v. Fidelity Trust Company, 261 U. S. 114, 67 Law Ed. 556, 43 Supreme Court 288 ..... 8

Tennessee Oil Company v. McCanless, 317 U. S. 588, 87 Law Ed. 482, 63 Supreme Court 34 ..... 8

Walter A. Wood Mowing & Reaping Machine Company v. Skinner, 139 U. S. 293, 297, 35 Law Ed. 193, 195, 11 Supreme Court 528 ..... 8

### Miscellaneous.

Rule 1.19, Rules, Supreme Court of Missouri ..... 8

*INDEX—Continued.*

**Statutes Cited.** PAGE


Section 1317, R. S. Mo., 1919 ..... 9
Section 862, R. S. Mo., 1929 ..... 9
Section 1014, R. S. Mo., 1939 ..... 9
Section 516.120, R. S. Mo., 1949 ..... 9
Section 9816, R. S. Mo., 1919 ..... 10, 11
Section 4997.118, R. S. A. ..... 10
Section 9813, R. S. Mo., 1919 ..... 10
Section 351.525, R. S. Mo., 1949 ..... 10, 11, 14
Section 351.385, R. S. Mo., 1949 ..... 14
Section 5030, R. S. Mo., 1939 ..... 14
Section 4555, R. S. Mo., 1929 ..... 14
Section 9749, R. S. Mo., 1919 ..... 14
Section 351.530, R. S. Mo., 1949 ..... 15

# In the Supreme Court of the United States

**October Term, 1951.**

No. 307.

THE CLARK ESTATE COMPANY, a Corporation, *Petitioner,*

vs.

ALONZO H. GENTRY, COMMERCE TRUST COMPANY, a Corporation, ESTHER REYBURN and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, Co-Executrix and Co-Executor of the Estate of Roscoe Reyburn, Deceased, *Respondents.*

## JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Respondents respectfully submit the following Statement and Brief in Opposition to the Petition for Writ of Certiorari.

### STATEMENT.

The issues here arise out of a petition alleging conspiracy, misrepresentation, and fraud on the part of Respondents, allegedly resulting in loss of a building and property, and praying for damages against Respondents on account thereof. On March 6, 1930 (R. 29-32), the action was pur-

ported to have been filed by a former but then nonexisting Missouri corporation, bearing the name "The Clark Estate Company." On August 30, 1950, by Fourth Amended Petition (R. 2) the purported corporation pleaded for the first time the forfeiture of its Charter occurring in 1927 (R. 33, 34) prior to institution of suit, and admitted its nonexistence from that time until rescission of forfeiture of charter in 1946. This made it possible for the first time since inception of the purported action for the Respondents to effectively challenge the right of the nonexistent corporation to maintain the action, which they forthwith did by filing their separate motions to dismiss (R. 20-27), on the ground of forfeiture of the purported Petitioner's Charter, want of capacity to sue, and the bar of limitations under Missouri statutes. These motions to dismiss were sustained by the trial court (R. 99, 100). The ruling was affirmed in the Supreme Court of Missouri (R. 104, 119) and motion for rehearing and motion to transfer to the Court *en banc* denied by that court (R. 120).

The chronology of events, what happened, and when it happened are important and are hereinafter listed and identified in the record for easy reference:

1.

January 1, 1927:

Petitioner's Corporate Charter forfeited (R. 33, 34).

2.

March 6, 1930:

Petitioner's original Petition filed (R. 29-32).

3.

December 18, 1930:

Date of loss and damage to Petitioner (alleged for the first time in Amended Petition filed February 12, 1934), resulting in judicial sale of the property (R. 63).

4.

July 3, 1934:

Corporate existence and capacity of Petitioner to sue challenged by pleading under oath of Respondent Commerce Trust Company (R. 54, 55).

5.

July 21, 1935:

Corporate existence and capacity of Petitioner to sue challenged by pleading under oath of Respondent Gentry (R. 40-43).

6.

December 18, 1935:

Action for damages barred by Five-Year Statute of Limitation (R. 111, Opinion).

7.

January 17, 1946:

Rescission of forfeiture of Petitioner's Corporate Charter (R. 19).

8.

August 30, 1950:

Petitioner files Fourth Amended Petition admitting within the pleading the existence of the forfeiture for the 19-year period (R. 2-20).

9.

September 6, 1950:

Separate motions to dismiss on the ground of forfeiture, want of capacity to sue, and bar of limitations, sustained by the trial court and judgment of dismissal with prejudice entered against Petitioner (R. 99, 100).

Other basic facts are fairly recited in the opinion of the Supreme Court of Missouri (R. 105-108) which recital of facts we adopt.

The issue in the Supreme Court of Missouri decided favorably to Respondents and against Petitioner was whether a nonexistent corporation whose charter had admittedly theretofore been forfeited under applicable Missouri statutes could validly institute action in its corporate name, remain in a state of forfeiture for sixteen years after the institution of the action, and then by rescission of such forfeiture breathe life into the action, and instill it with validity and thus overcome the bar of the applicable Missouri Five-Year Statute of Limitations, and extend such period of limitations to a period in excess of sixteen years (R. 115, Opinion).

The issue here, as we understand it, is whether the Supreme Court of Missouri in rendering such decision has decided it in a way probably not in accord with applicable decisions of this Court. More narrowly stated, the issue here is whether the instant decision conflicts with any prior decision upon which Petitioner relied, and was hence denied substantial rights through a violation of the due process clause. We undertake hereafter to demonstrate that the decision worked no injury to Petitioner's substantial rights, did not violate the due process clause of the Fourteenth Amendment, and there is no existing prior decision upon which Petitioner could or did rely, or with which the instant decision is in conflict.

## BRIEF AND ARGUMENT.

### I.

### No Basis of Jurisdiction.

Petitioner has undertaken to state the grounds upon which the jurisdiction of this Court is invoked. For such basis it refers to three decisions of this Court. The first of these is *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 74 Law Ed. 1107, 50 Sup. Ct. 451.

In this case the Supreme Court of Missouri had rendered a prior decision holding that the Missouri State Tax Commission had no power to act upon a complaint of inequitable and discriminatory taxation. In reliance upon this prior decision, the plaintiff did not file a complaint with the State Tax Commission, but brought suit in the trial court to restrain the Collector from collecting the taxes. The trial court dismissed the petition and on appeal the Supreme Court of Missouri affirmed the dismissal, holding that the plaintiff should have filed a complaint with the Missouri State Tax Commission. This Court reversed the judgment and remanded the case because of the infringement of the plaintiff's rights of due process, saying "then it was too late for the plaintiff to avail itself of the newly found remedy." No such reversal of construction or conflict with prior decision exists here.

Illustrating that there was no prior decision here upon which Petitioner relied, the Supreme Court of Missouri in its opinion (R. 112) mentions that the precise limitations questioned here involved was ruled in *Cleveland* v. *Gore Bros.,* 14 Cal. App. 2d 681, 58 P. 2d 931, and rules that the Petitioner had no right to institute the action, and that at the time of rescission of the forfeiture in 1946 the action had been barred by the Five-Year Statute

of Limitation. The Court adopted the decision in the Cleveland case as being the applicable principle because there was no controlling Missouri decision on the question. The Court in its opinion states of the Cleveland case (R. 113), "This is a correct statement of the law and these principles are controlling here." The Court further states (R. 115), "It is our view that insofar as statutes of limitations may be involved, the principles announced in *Cleveland* v. *Gore Bros., supra,* should be applied." In referring to Missouri decisions urged by Petitioner, the Court says in its opinion (R. 116), "Substitution for a nonexistent corporation was not involved in any of these cases. * * * The claim of the company was barred long before the company, as a revived corporation, even acquired the right to file and prosecute a cause of action thereon."

Simply stated, the Supreme Court of Missouri decided a case of first impression before it, with which decision the Petitioner is dissatisfied. It is obvious from a reading of Petitioner's brief and the opinion of the Court that there was no decision upon which the purported plaintiff could or did rely, because no decision favorable to Petitioner on the point existed.

The remaining jurisdictional decisions mentioned by Petitioner, *State of Missouri ex rel. Missouri Insurance Company* v. *Gehner*, 281 U. S. 313, 74 Law Ed. 870, 50 Sup. Ct. 326, and *Zucht* v. *King*, 260 U. S. 174, 67 Law Ed. 194, 43 Sup. Ct. 24, are cited apologetically, apparently upon the conviction by Petitioner that they excuse the belated raising of a Federal question for the first time on a motion for rehearing filed in the Supreme Court of Missouri. The Missouri Insurance Company case holds that such a raising of a Federal question in a motion for rehearing in a state appellate court is not too late where the decision of such appellate court places a construc-

tion upon a state law not reasonably to be anticipated. The Zucht case is apparently cited as leading color to Petitioner's claim that the injury to its rights are substantial in character. However, this decision points out that the very same question had been many times decided by this Court adversely to Petitioner, and hence the writ of error was dismissed.

The record in this case clearly indicates (R. 100) that the motions to dismiss on the grounds urged were sustained and judgments entered in the trial court against Petitioner. Petitioner had every reason at all times during the proceeding to anticipate that the same construction would be placed upon the law and applicable statutes by the Supreme Court of Missouri, but the record is devoid of any mention of a Federal question raised by pleading or otherwise until after the opinion was rendered by the Supreme Court of Missouri. It then, upon motion for rehearing, raised a Federal question for the first time as an afterthought and because the fact that "a Federal question is involved" is specified under Section 9 of Article V of the Missouri Constitution as a ground for a motion to transfer to the court *en banc*. The Supreme Court of Missouri under the law basically operates in two divisions.

It will be noted that the opinion of the Supreme Court of Missouri (R. 105-116) nowhere considers a Federal question, because none had been raised. The final order and judgment (R. 120), denying the motion for rehearing, or to transfer to the court *en banc*, does not rule any federal question and presumably was based on a question of state law raised by Petitioner in its contention before that court that its decision in the instant case was in conflict with prior controlling decisions of the same court, with which contention the Supreme Court of Missouri did not agree.

Under these circumstances, it is our view that there is no basis for this Court to take jurisdiction, and this issue is resolved against Petitioner by the decisions of this Court in *Rooker* v. *Fidelity Trust Company*, 261 U. S. 114, 67 Law Ed. 556, 43 Supreme Court 288, and cases there cited; *American Surety Company* v. *Baldwin*, 287 U. S. 156, 77 Law Ed. 231, 53 Supreme Court 98, and cases there cited. See also *Tennessee Oil Company* v. *McCanless*, 317 U. S. 588, 87 Law Ed. 482, 63 Supreme Court 34. Petitioner urged and relied mainly in the motion for rehearing on the local state law that the decision of the Court was "contrary to established principles of the common law applied in all controlling decisions of the appellate court of Missouri" and "is in violation of and contrary to all of the prior controlling decisions of the appellate courts of this state" (R. 117). This was done in conformity with our Rule 1.19, Rules of the Supreme Court of Missouri, which provides: "The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court as shown by its opinion."

The Supreme Court of Missouri did not indicate any consideration or ruling of a federal question in its order denying the motion for rehearing or to transfer to the court *en banc*. It is apparent that the decision of the state court might have been either on a state ground or a federal ground and the substantial state ground is sufficient to sustain the judgment. Under these circumstances, this Court will not undertake to review it. *Klinger* v. *Missouri*, 13 Wall. (U. S.) 257, 263, 20 Law Ed. 635, 637; *Walter A. Wood Mowing & Reaping Machine Company* v. *Skinner*, 139 U. S. 293, 297, 35 Law Ed. 193, 195, 11 Supreme Court 528; *Allen* v. *Arguimbau*, 198 U. S. 149, 154, 155, 49 Law Ed. 990, 993, 25 Supreme Court 622;

*Lynch* v. *New York*, 293 U. S. 52, 79 Law Ed. 191, 55 Supreme Court 16.

## II.

**The decision upon which review is sought does not conflict with any prior decision.**

Reverting to the schedule of events heretofore found on page 2 of Respondents' statement, it is noted that Petitioner's Corporate Charter was forfeited on January 1, 1927. Over three years later, on March 6, 1930, the purported corporation undertook to institute this action at a time when it had no right to do so. On February 12, 1934, Petitioner alleged for the first time in an amended petition then filed, that its date of loss and damage resulting in judicial sale of the property occurred on December 18, 1930. Conceding that this was the date of loss and damage, Petitioner had five years thereafter within which to institute an action for damages. This was controlled by the Limitation Statute, Section 1317, R. S. Mo., 1919, in effect at the time the cause of action was alleged to have arisen; Section 862, R. S. Mo., 1929, in effect at the time the action was instituted; Section 1014, R. S. Mo., 1939, a successor statute, and now designated as Section 516.120, R. S. Mo., 1949. The limitation period of five years has remained the same through each of these re-enactments of the statute.

Thus, the Petitioner had until December 18, 1935, to restore its Charter and properly institute an action or substitute the last officers and directors as plaintiffs. On July 3, 1934, eighteen months prior to the bar of limitation, Respondent Commerce Trust Company challenged by pleading under oath, the corporate existence and capacity of Petitioner to sue (R. 54, 55). On June 21, 1935, Respondent Gentry likewise challenged such capacity by

a pleading under oath (R. 40-43). Petitioner, its directors and officers and its counsel, for perverse and stubborn reasons best known to themselves, refused to restore the Corporate Charter or to substitute the last officers and directors as trustees and plaintiffs, as is expressly provided for in case of forfeiture under Section 9816, R. S. Mo., 1919, now substantially a part of Section 4997.118, R. S. A., and Section 351.525, R. S. Mo., 1949.

The conduct of these officers and directors is so unique as to be beyond explanation. They were well aware of the forfeiture, notice of which was mailed to them on January 1, 1927 (R. 33, 34). Such notice advised them that their corporate rights, privileges and franchises were forfeited and cancelled and the corporation dissolved. Counsel were well aware of it because the pleadings asserting the forfeiture and lack of capacity were served on them and filed of record on the dates indicated. This notice was required to be mailed to the corporation, its officers and directors, and was mailed to them in accordance with the provisions of the then existing statute, Section 9813, R. S. Mo., 1919, now substantially the same, and currently Section 351.525, R. S. Mo., 1949.

In fact, the conduct of these officers and directors and their counsel is so unusual as to illustrate and explain why the Supreme Court of Missouri has never been called upon prior to this decision to pass upon such a situation or issue. The inaction of Petitioner and the officers and directors who were the operating staff of Petitioner left Respondents in a difficult situation for a period of sixteen years during the time from 1930, the date of alleged damage, until 1946, the time of rescission of forfeiture. During this interim, Respondents were obviously unable to obtain a binding judgment in favor of themselves against the trustees of the dissolved corporation upon the merits of the cause of action involved

in the instant case, or to assert any counter- or cross-claim, if any they had. A judgment during this period in favor of Respondents against the ghost corporation would not have been *res judicata* upon the merits, since the Petitioner was nonexistent, was not a real party in interest, and the cause of action under Missouri law belonged to and was owned by the last officers and directors as trustees. See Section 351.525, R. S. Mo., 1949, and its predecessor statutes, including Section 9816, R. S. Mo., 1919, which made the last officers and directors, or the manager or managers of the affairs of the corporation at the time forfeiture was declared, trustees of the dissolved corporation with full power to settle its affairs and to sue and recover debts and property due the corporation.

Meanwhile, through changes in personnel employed by Respondents and deaths among the Respondents, the action could and did grow increasingly difficult to defend through loss of witnesses and evidence which afforded Respondents more than ample defense on the merits of the action. If Petitioner had any motive this must have been it, though we may not conjecture. This ghost corporation as Petitioner thus sought to hide under a claimed cloak of immunity from the Missouri law, by which it was governed as a domestic corporation of Missouri, for a period of sixteen years from the date of institution of the action, sixteen years from the date of the alleged loss and damage, and for twenty-three years after forfeiture before it, through some whim or fancy, changed its position, and in August of 1950 for the first time was willing to plead a true recital of the facts of forfeiture and disqualification to maintain the action.

We judge the following to be a reasonable statement in the Court's own language of the reasons why the

Supreme Court of Missouri affirmed the judgment of dismissal and entered final judgment thereon:

> (1) In view of the clear language of Section 9816, R. S. Mo. 1919 * * * (vesting the officers and directors with ownership of the cause of action after forfeiture of the Corporate Charter), we rule the corporation was not entitled to file the suit (R. 108).
>
> (2) Over 3 years prior to the filing, the corporation had been dissolved, its rights to exercise corporate powers had been forfeited and its capacity to function as a corporation had been revoked (R. 108).
>
> (3) Among the statutory rights forfeited was that of suing as a corporation. * * * The corporation could no longer sue in its own name. Having no legal entity, it could not be a party plaintiff or defendant at law or in equity (R. 108).
>
> (4) Only the officers and directors as trustees in their representative capacity were entitled to institute the action (R. 108).
>
> (5) Upon assumptions most favorable to the company, the cause was barred by the 5 year Statute (Section 862, Mo. R. S. 1929, Section 1014, Mo. R. S. A., now Section 516.120, Mo. R. S. 1949) on December 18, 1935 (R. 111).
>
> (6) The statutory trustees, the only persons entitled to bring a suit on the alleged cause, never sued. Nor did they make any effort to be substituted as parties plaintiff * * * either during the 5 years the Statute was running, or at any time during the next 11 years after the Statute had run and before the rescission (R. 111).
>
> (7) The right to sue was nonexistent at the time the suit was filed and was continuously nonexistent until revived or restored by the state 16 years after the filing (R. 111).
>
> (8) To permit the substitution of the revived corporation as party plaintiff after the Statute had run against this claim, would be contrary to the letter and spirit of our statutes relating to substi-

tution of parties, domestic corporations and limitations of actions (R. 114, 115).

(9) The claim of the company was barred long before the company as a revived corporation even acquired the right to file and prosecute a cause of action thereon (R. 116).

These to our mind are compelling and cogent reasons and are plainly and directed stated.

Petitioner has cited a line of cases attempting to show that:

> "The said decision of the Supreme Court of Missouri is * * * directly contrary to all the decisions determining the same question * * * in every case previously decided in Missouri, and by the common law courts in practically every state in the Union."

In all of said cases cited by Petitioner there is not a single case in which, as in the instant case, the question ruled by the Court was whether a nonexisting corporation whose charter had theretofore been forfeited under applicable statutes, could validly institute action in its corporate name, remain in a state of forfeiture for a period beyond the applicable Statute of Limitations, and thereafter by obtaining rescission of such forfeiture, breathe life into the action and instill it with validity, and thus overcome the bar of the applicable Statute of Limitations. Many of said decisions do not involve corporate parties. Many do not involve the bar of limitations. No decision relied on by Petitioner rules the instant case.

The class of cases distinguished by the Supreme Court of Missouri is the same class of cases cited by Petitioner. It will be noted that a number of such cases so cited by Petitioner are specifically mentioned in the opinion (R. 114-116).

Illustrative of the Respondents' contention that Petitioner's claim of conflict with prior decisions is unreal, we quote from the opinion of the Supreme Court of Missouri (R. 114), "We have studied the many cases from other jurisdictions cited by the company and find them inapplicable. None involved limitations of actions." Referring to the long line of Missouri decisions relied on by Petitioner and cited here, the opinion says, "It may be noted that those substituted plaintiffs were individuals entitled to bring the suit originally which the company here was not. * * * The substituted plaintiff * * * could have sued initially as an existent corporation which the company here could not. Substitution for a nonexistent corporation was not involved in any of these cases" (R. 115, 116).

In the instant case, the original purported plaintiff was initially a creature of the Corporation Statutes, which Statutes artificially conferred upon the Petitioner the right to sue. This right has its source in the Statutes: Section 351.385, R. S. Mo., 1949, and predecessor Statutes, Section 5030, R. S. Mo., 1939, Section 4555, R. S. Mo., 1929 and Section 9749, R. S. Mo., 1919. The Corporation Code of Missouri is self-governing and this right to "sue and be sued, complain and defend in any court of law or equity," can be and was, in 1927 taken away from Petitioner for noncompliance, and forfeiture entered under the provision of Section 351.525, R. S. Mo., 1949, and its predecessor Statutes, which specifies that upon forfeiture "the corporate rights and privileges of such corporation shall be forfeited." The Supreme Court of Missouri says of this (R. 108): "Among the statutory rights forfeited, was that of suing as a corporation. * * * The corporation could no longer sue in its own name. Having no legal entity, it could not be a party plaintiff or defendant in law or in equity." Before Petitioner's

legal entity was restored to it by rescission of the forfeiture of its charter the applicable Missouri Statute of Limitations had run.

Another controlling reason for the Court's decision was that the purported institution of this action after forfeiture was in and of itself unlawful and made a misdemeanor punishable by fine and imprisonment. Section 351.530, R. S. Mo., 1949, which has been substantially the same since 1919. This is a wise regulatory power that a corporation as an artificial creature of Statute may be controlled through the Secretary of State and kept within its lawfully granted powers. Neither the Supreme Court of Missouri nor this Court should be or will be inclined to permit Petitioner to gain an advantage through an unlawful act.

Another failure of applicability of the decisions relied upon by Petitioner is apparent when it is considered that the purported Petitioner had no cause of action and did not own the cause of action, because it belonged to the last officers and directors as trustees for the benefit of stockholders and creditors. The Supreme Court of Missouri in its opinion says of this: "On the day of the forfeiture, the company's very being as a legal entity was destroyed and from that date the then officers and directors of the dissolved corporation became statutory trustees of its affairs for the purpose stated in the Statute. * * * The right to assert its claim against these defendants was vested by law exclusively in the trustees. Only they—as such trustees in their own names, in behalf of the corporation, in their representative capacity —were entitled to institute the action filed on March 6, 1930. They were 'necessary parties' " (R. 108).

Petitioner claims that Respondents are collaterally attacking its existence. This is a misconception of Respondents' position. We make no complaint about Peti-

Illustrative of the Respondents' contention that Petitioner's claim of conflict with prior decisions is unreal, we quote from the opinion of the Supreme Court of Missouri (R. 114), "We have studied the many cases from other jurisdictions cited by the company and find them inapplicable. None involved limitations of actions." Referring to the long line of Missouri decisions relied on by Petitioner and cited here, the opinion says, "It may be noted that those substituted plaintiffs were individuals entitled to bring the suit originally which the company here was not. * * * The substituted plaintiff * * * could have sued initially as an existent corporation which the company here could not. Substitution for a nonexistent corporation was not involved in any of these cases" (R. 115, 116).

In the instant case, the original purported plaintiff was initially a creature of the Corporation Statutes, which Statutes artificially conferred upon the Petitioner the right to sue. This right has its source in the Statutes: Section 351.385, R. S. Mo., 1949, and predecessor Statutes, Section 5030, R. S. Mo., 1939, Section 4555, R. S. Mo., 1929 and Section 9749, R. S. Mo., 1919. The Corporation Code of Missouri is self-governing and this right to "sue and be sued, complain and defend in any court of law or equity," can be and was, in 1927 taken away from Petitioner for noncompliance, and forfeiture entered under the provision of Section 351.525, R. S. Mo., 1949, and its predecessor Statutes, which specifies that upon forfeiture "the corporate rights and privileges of such corporation shall be forfeited." The Supreme Court of Missouri says of this (R. 108): "Among the statutory rights forfeited, was that of suing as a corporation. * * * The corporation could no longer sue in its own name. Having no legal entity, it could not be a party plaintiff or defendant in law or in equity." Before Petitioner's

legal entity was restored to it by rescission of the forfeiture of its charter the applicable Missouri Statute of Limitations had run.

Another controlling reason for the Court's decision was that the purported institution of this action after forfeiture was in and of itself unlawful and made a misdemeanor punishable by fine and imprisonment. Section 351.530, R. S. Mo., 1949, which has been substantially the same since 1919. This is a wise regulatory power that a corporation as an artificial creature of Statute may be controlled through the Secretary of State and kept within its lawfully granted powers. Neither the Supreme Court of Missouri nor this Court should be or will be inclined to permit Petitioner to gain an advantage through an unlawful act.

Another failure of applicability of the decisions relied upon by Petitioner is apparent when it is considered that the purported Petitioner had no cause of action and did not own the cause of action, because it belonged to the last officers and directors as trustees for the benefit of stockholders and creditors. The Supreme Court of Missouri in its opinion says of this: "On the day of the forfeiture, the company's very being as a legal entity was destroyed and from that date the then officers and directors of the dissolved corporation became statutory trustees of its affairs for the purpose stated in the Statute. * * * The right to assert its claim against these defendants was vested by law exclusively in the trustees. Only they—as such trustees in their own names, in behalf of the corporation, in their representative capacity —were entitled to institute the action filed on March 6, 1930. They were 'necessary parties' " (R. 108).

Petitioner claims that Respondents are collaterally attacking its existence. This is a misconception of Respondents' position. We make no complaint about Peti-

tioner's present existence, or its existence since 1946. The Supreme Court of Missouri aptly answers Petitioner's contention (R. 108): "The company contended that the judgment below was erroneous because based upon a collateral attack upon the validity of the rescission. However, the issue here is not the validity of the rescission, but its effect."

Beginning with the argument, Petitioner devotes much space in its brief to waving the flag and inferring that the Missouri court and presumably other state courts are corrupt. This space could better be devoted by Petitioner to an explanation of the manner in which Petitioner pretended to carry on this litigation, and an explanation of the reasons why the officers, directors and counsel of the former corporation did not remedy their position when it was forcibly called to their attention and when they were warned to do so by sworn pleadings and notices of forfeiture under the Seal of the Secretary of State.

Petitioner complains that this action is in a class by itself, because it was pending for a long time. Presumably Petitioner feels that if it had been pending for a shorter time it would have altered the decision. It is apparent from examination of the Court's opinion that the decision does not rest on the length of time the action was pending, but upon the bar of limitations. "Upon assumptions most favorable to the company the cause was barred by the 5-Year Statute * * * on December 18, 1935." If the action had been pending in the same status for five years and one day prior to rescission, the same bar of limitations would become effective.

Petitioner complains in a novel manner of the specter of forfeiture haunting the plaintiff for sixteen years by referring to its own allegation in the Fourth Amended Petition. This specter could have been cured at the will

of the officers and directors of the corporation by simple motion for substitution of themselves in the capacity of trustees as plaintiffs, or rescission of forfeiture in 1935 or earlier, instead of 1946. The Petitioner chose to ignore the notice of forfeiture and the warnings given it in the pleadings beginning in 1934, some eighteen months prior to the bar of limitations. It chose to ignore the self-imposed problem of its lack of existence twelve years beyond the first pleading of it, up until 1946, at which time it had then been on notice from the Secretary of State for nineteen years that it had no capacity to sue.

Petitioner's contention for a theory of relating back to defeat the bar of limitations and thus bring a real party plaintiff into existence for the first time, sixteen years after the alleged occurrence of damages, is without support of any provision of Missouri statutory law. It is contrary to the principle announced by the Supreme Court of Missouri in *Goldschmidt* v. *Pevely Dairy Co.*, 341 Mo. 982, 111 S. W. 2d 1, l. c. 3, and cases there cited. There is no decision of this Court, no factual situation, or legal principle or reason to relate back the cause of action to its alleged inception in 1930. If the relating back theory could be applied in disregard to the bar of limitations, the action could well be kept alive for a century without giving the Respondents an opportunity for final and conclusive adjudication on the merits. Respondents have at all times acted in good faith in this action, and in all respects complied with the law. The Record, Petitioner's Statement, Brief and Argument show that the Petitioner at no time acted in good faith, or even attempted to comply with the law, though repeatedly and constantly warned.

**Conclusion.**

Respondents suggest that the decision and opinion of the Supreme Court of Missouri is sound in all respects, fully applies controlling principles of law, exhaustively considers all of Petitioner's contentions, and is not in conflict with any prior decisions of this Court, or any of its own prior decisions. We further suggest that there is no basis of jurisdiction in this Court for entertaining the Petition for the Writ of Certiorari and that the Writ should not issue.

We respectfully request this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Missouri.

Respectfully submitted, Armwell L. Cooper

ARMWELL L. COOPER,
1015 Commerce Building,
*Counsel for All Respondents.*
WALLACE SUTHERLAND,
1015 Commerce Building,
*Counsel for Respondent Gentry.*
ROBERT L. JACKSON,
304 Commerce Building,
*Counsel for Respondents*
*The First National Bank and*
*Esther Reyburn, Co-Executors.*
HUGH M. HILLER.
PHILIP J. CLOSE.
218 Commerce Building,
*Counsel for Respondent*
*Commerce Trust Company.*
All of Kansas City, Missouri.

14

Office-Supreme Court,
FILED
OCT 15 1951
CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

## No. 307

THE CLARK ESTATE COMPANY, a Corporation,
*Petitioner,*

vs.

ALONZO H. GENTRY, COMMERCE TRUST COMPANY, a Corporation, ESTHER REYBURN and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, CO-EXECUTRIX AND CO-EXECUTOR OF THE ESTATE OF ROSCOE REYBURN, DECEASED,

*Respondents.*

## PETITIONER'S REPLY BRIEF.

CLARENCE C. CHILCOTT,
600 National Fidelity Life Building,
Kansas City, Missouri,
Counsel for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago